COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2316-CR **Cir. Ct. No. 2011CF221**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD J. SULLA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN and DAVID WAMBACH, Judges. *Order reversed and cause remanded*.

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Richard Sulla appeals a judgment of conviction and an order denying his motion for postconviction relief. The issue is whether the circuit court erred in denying Sulla's postconviction motion without an

evidentiary hearing. We conclude that it did. We reverse the order denying the postconviction motion and remand.

¶2 Under the terms of the plea agreement stated in circuit court, Sulla would plead no contest to two counts of burglary, while the court would dismiss and read in one count of conspiracy to commit arson and one count of operating a motor vehicle without the owner's consent. After sentencing, Sulla moved to withdraw his plea on the ground that it was entered unknowingly because he did not realize that by allowing the arson count to be read in "he would effectively be considered to have committed the offense."

¶3 Sulla also alleged that his attorney was ineffective by not properly advising him about the read-in concept. In an affidavit, Sulla averred that "my Attorney … told me that agreeing to the read-in offense of arson was not admitting guilt and that it was just something the Court would 'look at' at sentencing." Sulla further averred that "if I had known that it was going to be considered as a negative at my sentencing I would not have entered the no-contest plea."

¶4 The circuit court issued a written decision denying the motion without an evidentiary hearing. We will further describe the circuit court's reasons below.

¶5 We begin our analysis with a discussion of the legal paths available for plea withdrawal. One path is found in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Under ***Bangert***, if a defendant shows that the circuit court failed, during the plea colloquy, to perform one of the many required duties, and the defendant alleges that she or he did not understand the information that should have been provided, the defendant is entitled to an evidentiary hearing at which

the State has the burden to prove by clear and convincing evidence that the plea was entered knowingly, voluntarily, and intelligently. ***Id.*** at 274.

¶6 We do not regard this as a ***Bangert*** case. Sulla does not argue that a plea colloquy must include an explanation of the "read-in" concept. We are not aware of any case law holding that such an explanation is a required duty. Therefore, this cannot be a ***Bangert*** case in which we would say that the plea colloquy is deficient and Sulla is entitled to an evidentiary hearing at which the State has the burden.

¶7 The other legal path to plea withdrawal is found in ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). Under ***Bentley***, a defendant is entitled to an evidentiary hearing if the motion alleges facts that, if true, would entitle the defendant to relief. ***Id.*** at 310. The allegations must be more than conclusory. ***Id.*** at 309-10.

¶8 We regard Sulla's motion as being made under ***Bentley***. Because the circuit court denied the motion without an evidentiary hearing, the first question before us is whether the motion alleges facts that, if true, would entitle Sulla to relief. This is a question of law that we review without deference to the circuit court. ***Id.*** at 310. As far as we can tell from case law, this evaluation is to be made without weighing the allegations for truth or credibility against the rest of the record.

¶9 We next clarify the extent to which ineffective assistance of counsel plays a role in our analysis. Sulla has alleged that he did not fully understand the read-in concept, in part because of the way his attorney explained it, and he also alleges that trial counsel was ineffective in that explanation. The circuit court's decision appeared to focus mainly on the ineffective assistance claim.

¶10 When the underlying allegation is that the defendant did not understand some essential concept related to the plea, it normally does not add anything useful to the analysis to further allege that counsel was ineffective. If it is true that the defendant failed to understand the essential concept, it should not normally matter what the reason for that failure was. In other words, it makes no difference to the ultimate outcome whether it was a misstatement by counsel that caused the defendant's misunderstanding, or whether instead the misunderstanding arose from some other source, such as a misstatement by the court, incorrect information from a friend, or the defendant's own internal failure to comprehend otherwise correct information. Accordingly, rather than discuss Sulla's "read-in" argument in terms of ineffective assistance, we address it simply as a question of whether Sulla's plea was not entered knowingly because he did not properly understand the read-in concept.

¶11 We now consider whether Sulla's motion alleges facts that, if true, would entitle him to relief. We note that the State does not appear to dispute that if Sulla failed to properly understand the read-in concept, that would be a fact entitling him to relief, in the sense that it would make the plea not knowing, voluntary, and intelligent. Nor does the State argue that the factual allegation of Sulla's lack of understanding is conclusory.

¶12 We conclude that Sulla's factual allegation is sufficient. It is not inherently implausible that a defendant would misunderstand the read-in concept. That concept is not intuitively obvious to non-lawyers. The idea of a defendant admitting to the conduct underlying the charges, even while the State dismisses the charges, has a certain inconsistency that creates a potential for confusion. That same potential is also present in the distinction between the idea that read-in does not increase the legally available sentence, but the court is still able to consider the

read-in for purposes of lengthening a sentence on the actual conviction for some *other* charge.

¶13 In that potentially confusing context, Sulla's allegation that his attorney told him "that agreeing to the read-in offense of arson was not admitting guilt and that it was just something the Court would 'look at' at sentencing" is sufficient to allege why Sulla may not have understood the read-in concept. The alleged statement by counsel contains an ambiguity that, as discussed further below, adds to the potentially confusing nature of the read-in concept.

¶14 The circuit court concluded that this allegation was insufficient because the alleged statement by counsel contained "accurate statements of the law." As viewed by the circuit court, counsel was stating that "[t]he court would not find him guilty of the arson for purposes of exposure to a sentence on that offense and 'look at' is another way to describe 'consider.'"

¶15 The problem we see in the circuit court's conclusion is that it does not recognize the ambiguity in the word "guilt" as used in the alleged statement by counsel. If counsel said that agreeing to a read-in was "not admitting guilt," there are two ways a non-lawyer might plausibly understand that. One way is that Sulla was not admitting to *committing the act* of arson, and the other is that Sulla was not *pleading guilty to an actual legal charge* for doing that act. The circuit court resolved that potential ambiguity in its own analysis by describing counsel as having said that the court would "not find him guilty of the arson *for purposes of exposure to a sentence on that offense*." (Emphasis added.) However, that italicized clarification added by the court is not present in counsel's statement, as alleged by Sulla. Therefore, given the potential for confusion that is inherent in

the read-in concept, we conclude that Sulla has alleged facts that, if true, would entitle him to relief.

¶16 However, a court can also properly deny a postconviction motion if the "'record conclusively demonstrates'" that the defendant is not entitled to relief. ***Bentley***, 201 Wis. 2d at 309-10 (quoted source omitted). That was the path mainly taken by the circuit court in this case. Case law provides that this is a discretionary decision for the circuit court. ***Id.*** at 310-11. We are not aware of any well-developed formulation in case law that describes the circumstances under which a court may conclude that the "record conclusively demonstrates" that a defendant is not entitled to relief. Therefore, we next discuss what we understand to be the scope of a court's ability to reject a postconviction motion's factual allegations on that basis.

¶17 We discuss this point because a potential inconsistency is present in the standards described in ***Bentley***. That case law requires a hearing to be held if the defendant alleges facts that, if true, would entitle the defendant to relief, but it also allows a hearing to be denied if the record conclusively demonstrates that the defendant is not entitled to relief. These two concepts are potentially in conflict because the former seems to require an evidentiary hearing unconditionally, but the latter provides an option in which it appears that an evidentiary hearing can nonetheless be denied, even when the defendant makes allegations that would entitle him to relief, if true. The relationship of these concepts is not made entirely clear in existing case law.

¶18 To reconcile these concepts, we understand a record to "conclusively demonstrate" the falsity of a defendant's factual allegations when, even after hearing the expected testimony in support of the postconviction motion at an

evidentiary hearing, no reasonable fact-finder could find in the defendant's favor, in light of the rest of the record. This standard reconciles the two concepts in a way that provides for hearings in those cases where arguable factual disputes exist, but makes hearings unnecessary when only one outcome is reasonably possible. If the record is not sufficiently conclusive to meet that standard, it means that the allegations are reasonably disputable and a hearing must be held, because normally a court cannot make findings on reasonably disputable facts by using solely a paper record.

¶19 Although this may seem to be a high standard, it is easily met in some cases. The existing record may be conclusive when a defendant makes a factual allegation about some event that occurred outside of herself or himself and on the record. For an allegation of this type, the record may contain direct evidence refuting it. For example, a defendant might claim that an attorney made a certain statement during a hearing, or that a document contains particular content. However, such allegations could conclusively be refuted by the face of the transcript or document. In these situations, no reasonable fact-finder could believe the defendant's expected testimony over the existing record (assuming there was no accompanying challenge to the accuracy of the transcript itself, of course).

¶20 However, when the defendant's non-conclusory factual allegation is about something internal to the defendant, like her or his own understanding or intent, or is based on events that would not normally be covered by the existing record, it will often be more difficult to say that the record conclusively demonstrates the falsity of an allegation. That is because the existing record is likely to contain evidence that is mainly circumstantial, rather than direct. If a court tries to reject such an allegation on the basis of other parts of the record, the

court is essentially making a credibility finding that no fact-finder could believe the defendant's expected testimony. However, because the allegation in the motion does not necessarily contain every nuance or detail, and lacks demeanor and other qualities of live testimony, it is difficult for a court to "conclusively" say, based on circumstantial evidence, that no reasonable fact-finder could believe such an allegation. Once the defendant testifies, other material in the existing record is entirely proper to consider in making a determination of the defendant's credibility.

¶21 Applying these concepts to the present case, we are unable to agree with the circuit court's conclusion that the record conclusively demonstrates that Sulla properly understood the read-in concept. While the circuit court accurately described several aspects about the existing record that cast doubt on the accuracy of Sulla's allegation, none of them rise to the level of making it impossible for a reasonable fact-finder to believe that Sulla failed to properly understand the read-in concept, if Sulla's attorney gave him the explanation Sulla alleges.

¶22 Although we will not attempt to discuss all aspects of the record here, we note certain passages in the circuit court's analysis that show it exceeded the scope of what a court can properly consider when deciding whether the record conclusively demonstrates the falsity of the defendant's allegations. For example, in one passage the court speculated that Sulla "would presumably testify" in a particular way, and "at that point his credibility is impeached not only by the contrary record but by double digit prior criminal convictions without even considering his demeanor or what would be revealed through cross examination. What would be gained by an evidentiary hearing?" The court also made a credibility determination by weighing Sulla's allegation against portions of the existing record like the plea colloquy and plea questionnaire. These types of

credibility judgments and speculation about expected testimony cannot substitute for an evidentiary hearing.

¶23 To obtain an evidentiary hearing, a defendant seeking to withdraw a plea must also allege that she or he would have pled differently if she or he had properly understood the information she or he claims not to have understood. ***Bentley***, 201 Wis. 2d at 313. As we described earlier, Sulla alleged about the read-in that "if I had known that it was going to be considered as a negative at my sentencing I would not have entered the no-contest plea."

¶24 We follow the same path of analysis that we did above. Sulla's allegation that he would not have accepted the plea alleges a fact that, if true, entitles him to relief. Sulla's allegation is not conclusory because it identifies a specific concern that would have affected his plea decision, namely, the potential use of the arson read-in at sentencing.

¶25 The circuit court concluded that Sulla's allegation was insufficient. It did so in part on the ground that Sulla did not say that he would have gone to trial. While it is true that Sulla's allegation did not use the word "trial," we are not aware of any law requiring use of any specific words in this context. By saying that he would not have accepted the plea offer, Sulla was necessarily saying that he either would have gone to trial or negotiated for a different offer. It is not necessary for the defendant to allege with precision which of those would have happened after the defendant rejected the offer containing the read-in. Nor is it really even possible to make that allegation, given that the outcome of further plea negotiations would have depended on decisions made by the prosecution.

¶26 To the extent the circuit court may also have used the "record conclusively demonstrates" theory to reject as not credible Sulla's allegation that

he would have rejected the plea offer, we disagree with that conclusion for the same reasons as discussed above. The circuit court again engaged in speculation, such as stating "Sulla certainly would have been advised by his attorney" in a particular manner. Essentially, the court speculated about what decisions Sulla might have made about a plea or trial, without there being any testimony from Sulla that addressed those matters regarding his own internal goals and intent.

¶27 Sulla also makes two other arguments that we briefly address. First, he argues that when the circuit court judge noted before sentencing that she was familiar with the name of the victim from growing up in Oconomowoc, she failed to make a sufficient subjective consideration of the need for disqualification under WIS. STAT. § 757.19(2)(g) (2013-14).[1] This argument fails because Sulla cites no law that requires any specific form or content for such a determination to be adequate. Sulla also argues that his trial counsel was ineffective in some manner with respect to this issue, but the argument is vague as to precisely what his attorney should have done differently, or how that action by his counsel would have led to any different result.

¶28 Second, Sulla argues that the circuit court erroneously exercised its sentencing discretion by imposing an unduly harsh sentence. We conclude that the sentence was within the reasonable range of discretion. Sulla also argues that the court erred in finding him ineligible for the substance abuse program because the court did not sufficiently explain its decision. The decision was adequate.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.